No. 94-1837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

vs.

TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF INSURANCE, FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., AND FLORIDA ASSOCIATION OF INSURANCE AGENTS,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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Pursuant to Rule 37.3 of this Court, this brief is respectfully submitted by The New York Clearing House Association (the "Clearing House") with the consent of all parties.

Interest Of *Amicus Curiae*

The Clearing House is an unincorporated association of eleven commercial banks in New York City.[1] The Clearing

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan
(continued...)

House frequently appears as *amicus curiae* in cases, such as this one, that raise important questions concerning the ability of its member banks to provide products and services to the public.

The Clearing House has a significant interest in the questions presented here because of its member banks' present and potential involvement in the sale of insurance products as agents pursuant to 12 U.S.C. § 92 ("Section 92"). In an era of rapid consolidation of the financial services industry and increasing lack of differentiation among financial products, it is essential that commercial banks be permitted to offer, and consumers be able to obtain, insurance products to the extent authorized by Congress. State statutes and judicial interpretations that would limit that federal authority damage the Clearing House member banks and other members of the banking industry, harm consumers of financial services and are antithetical to our political and commercial system.

The Eleventh Circuit's decision below, *Barnett Bank, N.A.* v. *Gallagher*, 43 F.3d 631 (11th Cir. 1995) ("*Barnett Bank*"), upheld a Florida statute forbidding certain national banks to sell insurance, a result that is inconsistent with the plain meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), and with Section 92, the federal statute that "[a]lmost 80 years ago . . . authorized any national bank" to sell insurance, *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, __ U.S. __, __, 113 S. Ct. 2173, 2176 (1993) ("*United States Nat'l Bank*"). Members of the

[1](...continued)
Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank, and Republic National Bank of New York.

Clearing House therefore are directly affected by the decision below because of the unwarranted preclusion that it creates.[2]

Statutes Involved

This case involves the interpretation of two federal statutes and one state statute, which read in relevant part as follows:

15 U.S.C. § 1012(b) (the McCarran-Ferguson Act)

"[N]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."

12 U.S.C. § 92

"In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by

[2] Four members of the Clearing House, The Chase Manhattan Bank, N.A., Citibank, N.A., NatWest Bank N.A., and Republic National Bank of New York, are national banks subject to the National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified, as amended, in sections of Title 12 of the United States Code, which includes 12 U.S.C. § 92, discussed herein). In addition, at least three other members have affiliates which are national banks.

such company . . . *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance."

Fla. Stat. ch. 626.988(2)

"No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency."[3]

The Eleventh Circuit held that the Florida statute regulated the business of insurance, but that Section 92 did not specifically relate to the business of insurance.

[3] "Specifically excluded from this definition ['Financial institution'] is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census." Fla. Stat. ch. 626.988(1)(a). Petitioner is a national bank subsidiary of a bank holding company, and as such does not benefit from this exclusion.

Summary Of Argument

As this Court has recognized,[4] in enacting Section 92 Congress specifically authorized national banks located and doing business in any place whose population does not exceed five thousand inhabitants to sell insurance as agents, subject to rules and regulations prescribed by the Comptroller of the Currency. The Congress therefore has determined that national banks have this authority.

The McCarran-Ferguson Act creates a limited exception to the basic Constitutional policy of economic federalism by establishing a two-part test for a state statute to be immune from federal preemption. First, the state statute must "regulat[e] the business of insurance." Second, even if the state statute satisfies this first requirement, the federal statute will still preempt the state statute if the federal statute "specifically relates to the business of insurance." The state and federal statutes in question here cannot, under any logical reading, satisfy both prongs of this test. If the Florida statute's affiliation prohibition constitutes regulation of the business of insurance, then the federal statute's authorization at least relates to the business of insurance.

The Framers of the Constitution adopted a basic policy for this nation, designed to ensure against a balkanized and ultimately weakened economy, that matters of commerce should be the province of the Congress and not the individual states. U.S. Const. art. I, § 8; *see Gibbons* v. *Ogden*, 22

[4] *Nationsbank of North Carolina* v. *Variable Annuity Life Ins. Co.*, __ U.S. __, __, 115 S. Ct. 810, 812 (1995) ("*Nationsbank*") ("Section 92 . . . expressly authoriz[es] banks in towns of no more than 5,000 people to sell insurance"); *United States Nat'l Bank*, __ U.S. at __, 113 S. Ct. at 2176 ("Almost 80 years ago, Congress authorized any national bank 'doing business in any place the population of which does not exceed five thousand inhabitants . . . [to] act as the agent for any fire, life, or other insurance company.'") (quoting Section 92) (alteration in original).

U.S. (9 Wheat.) 1, 195 (1824). Although Congress may cede its powers in specific instances to the states, the basic Constitutional policy should not be thwarted by a distorted reading of the relevant statutes, as respondents have sought in this case.

The court below adopted the self-contradictory proposition that a state statute that *bars* banks and their affiliates from selling insurance is "regulat[ion]" of the business of insurance, but that a federal statute that *authorizes* national banks to sell insurance does not even "relat[e]" to the business of insurance. The Clearing House believes that the court below was in error on both prongs of the McCarran-Ferguson test. In any event, it should be beyond doubt that the court below cannot be correct on both prongs. If a statute barring insurance sales "regulat[es]" the business of insurance, then a statute specifically authorizing insurance sales must "relat[e]" to that business.

ARGUMENT

I.

The Eleventh Circuit Misapplied Both Parts of the McCarran-Ferguson Act

A. The Eleventh Circuit Erred in Holding That the Florida Statute Was Enacted for the Purpose of Regulating the Business of Insurance.

A state statute satisfies the first part of the McCarran-Ferguson Act test only if the state law was "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit, purporting to rely on this Court's decisions in *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) ("*National Securities*"), and *United States Department of*

Treasury v. *Fabe*, __ U.S. __, 113 S. Ct. 2202 (1993) ("*Fabe*"), concluded that Fla. Stat. ch. 626.988(2) satisfied this requirement because the law was designed to "protect policyholders." *Barnett Bank*, 43 F.3d at 635. Neither decision supports the Eleventh Circuit's conclusion that a statute excluding national banks from selling insurance products as agents is a statute "enacted for the purpose of regulating the business of insurance."

This Court in *National Securities* held that a state statute requiring that all insurance company mergers be approved by the state insurance director was not "enacted for the purpose of regulating the business of insurance." The Court's holding turned on its conclusion that the "relationship between the insurance company and the policyholder" constitutes the "core of the 'business of insurance.'" *National Securities*, 393 U.S. at 460. Because the state statute instead primarily protected the relationship between the insurer and its shareholders, the statute was not one "enacted for the purpose of regulating the business of insurance." *Id.*

In *Fabe*, the Court held that a state statute giving priority to the claims of policyholders against an insolvent insurance company over the claims of other creditors was a statute enacted for the purpose of regulating the business of insurance. Once again, this Court focused on the relationship between the policyholder and the insurance company. The Court reviewed the three criteria used to identify the "business of insurance" in *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119 (1982) ("*Pireno*").[5] The Court held

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[5] The Court in *Pireno*, construing McCarran-Ferguson's antitrust exemption, 15 U.S.C. § 1013(b), applied the following three-part test for identifying a practice as the "business of insurance": "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is (continued...)

that under *Pireno* an insurer's performance of its obligations pursuant to an insurance contract constitutes the "business of insurance." *Fabe*, __ U.S. at __, 113 S. Ct. at 2209. The Court proceeded to characterize the state's priority statute as one "enacted for the purpose of regulating" insurance because the state statute "was designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." *Id.*

These opinions determine that a state statute may be held to have been enacted for the purpose of regulating the business of insurance when the practices affected deal with the policy relationship between an insurer and an insured, including spreading the policyholder's risk, or with the performance of an insurer's obligations to the insured, but not when the state statute deals with the relationship between an insurance company and those other than policyholders, for example, shareholders of the company or competitors.

A state statute that bars national banks from acting as insurance agents in no way "regulates the business of insurance" because it has nothing to do with spreading risk or with the contract between insurer and insured, *see Pireno*, 458 U.S. at 127-29, or with the performance of a contract of insurance, *see Fabe*, __ U.S. at __, 113 S. Ct. at 2209. Instead, the Florida statute merely restricts competition by prohibiting national bank subsidiaries of bank holding companies from engaging in selling insurance as agents at all.[6]

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[5](...continued)
limited to entities within the insurance industry." *Pireno*, 458 U.S. at 129. The Florida statute in question here satisfies none of these tests.

[6] In focusing on whether the purpose of the statute under scrutiny in *Fabe* was to regulate the business of insurance, the Court relied in part (continued...)

Indeed, if Fla. Stat. ch. 626.988(2) "regulat[es]" anything, it, like Section 92, regulates the business of banking. *See National Securities*, 393 U.S. at 460. Banks are in the business of offering financial services to their clients. *See Nationsbank*, __ U.S. at __, 115 S. Ct. at 814 (recognizing that "[n]ational banks . . . serve as agents for their customers in the purchase and sale of various financial instruments"). The Florida statute attempts to adjust, manage and control the business of banking by limiting the authority of national banks to offer services to their customers, even though that authority is expressly granted by federal law. It directly affects the relationship between banks and their customers, limiting the availability of services that would otherwise be available to banking consumers, and leaves the relationship between insurer and insured undisturbed.

B. The Eleventh Circuit Erred in Holding That Section 92 Does Not Specifically Relate to the Business of Insurance.

Under the second prong of the McCarran-Ferguson Act test, a federal statute preempts a state statute "enacted for the purpose of regulating the business of insurance" if the federal statute "specifically relates to the business of insurance." The Eleventh Circuit erroneously concluded that Section 92 does not satisfy this requirement.

The "'starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any

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[6](...continued)
on the definition of "purpose" in Black's Law Dictionary 1236 (6th ed. 1990). *Fabe*, __ U.S. at __, 113 S. Ct. at 2210. That same reference draws an explicit distinction between regulation and prohibition, defining the word "prohibit" as "[t]o forbid by law; to prevent; — *not synonymous with 'regulate.'*" Black's Law Dictionary 1212 (6th ed. 1990) (emphasis added).

case involving the meaning of a statute, is the language of the statute itself.'" *Fabe*, __ U.S. at __, 113 S. Ct. at 2207-08 (quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979)). Ignoring this fundamental tenet of statutory construction, the Eleventh Circuit instead arrived at its narrow construction of the second part of McCarran-Ferguson by deviating substantially from the actual language of the statute.

Purporting to rely on *Fabe*, the court first held that a federal statute could preempt a state statute satisfying the first part of McCarran-Ferguson only if the federal statute "specifically requires" that it take precedence over the state law. *Barnett Bank*, 43 F.3d at 636. After rewording Congress' language in the second part of McCarran-Ferguson to include this specific preemption requirement, the court's application of its new test then inexplicably substituted the "regulating" language of the *first* part of McCarran-Ferguson for the broader term, "relates to," used by Congress. The Eleventh Circuit reviewed the history of Section 92 and concluded that the statute could not be construed to relate to insurance or specifically to require preemption because "Congress could not have been attempting to *regulate*" insurance since it believed it had no power to do so. *Id.* at 637 (emphasis added).[7]

In attempting to amend the actual language of McCarran-Ferguson, the Eleventh Circuit relied on a passing reference elsewhere in *Fabe* to the second part of McCarran-Ferguson, in which the Court noted that a federal statute still preempts a state statute if the federal law so "requires." *See Fabe*, __ U.S. at __, 113 S. Ct. at 2211. But *Fabe* never applied any such specific preemption requirement because, as

[7] In fact, Section 92's authorization of national banks to sell insurance as agents would be a regulation of insurance, at least on the Eleventh Circuit's own analysis that the Florida statute prohibiting such sales is a regulation of insurance.

the Court itself expressly noted, the parties agreed that the federal statute at issue did not "relat[e]" to insurance. *Id.* at __, 113 S. Ct. at 2208. The *Fabe* holding turned solely on the only contested issue, *i.e.*, the construction of the first part of McCarran-Ferguson, and it cannot fairly be interpreted as holding that the language of the second part of McCarran-Ferguson is anything other than that which Congress drafted. Thus, the Eleventh Circuit erroneously relied exclusively on what is at most *dictum* from the *Fabe* opinion for its new test. *See United States Nat'l Bank*, __ U.S. at __ n.11, 113 S. Ct. at 2187 n.11 (stressing the "need to distinguish an opinion's holding from its *dicta*").

The Eleventh Circuit's substitution of other words for the operative verb "relates" represents an impermissible melding of the two parts of McCarran-Ferguson. In its critical discussion of the history of Section 92, the court eventually resorted to the operative verb from the first part of McCarran-Ferguson, "regulat[e]" in an attempt to explain the second clause. *Barnett Bank*, 43 F.3d at 637. Similarly, the court's discussion of what Congress was "attempting to regulate" with Section 92, *id.*, suggests that the court was erroneously applying the "for the purpose of regulating" requirement of the first part of McCarran-Ferguson. The second part of McCarran-Ferguson requires only that a statute "specifically relat[e] to" insurance, not that the statute be enacted "for the purpose of regulating" insurance.

Had the Eleventh Circuit adhered to the actual language of the second part of McCarran-Ferguson, it would have correctly concluded that Section 92 preempts the Florida statute. The plain meaning of "relates" requires that the second part of McCarran-Ferguson be read to reach a statute that bears on the business of insurance whether or not there is actual regulation. *See* Black's Law Dictionary 1288 (6th ed. 1990) (defining "relate" as "[t]o stand in some relation; to have bearing or concern; to pertain"). Although the Court has not yet had the occasion to elaborate on the scope of the

second part of McCarran-Ferguson, it has recognized the conceptual breadth implicit in Congress' decision to use the word "relat[e]." *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, __ U.S. __, __, 114 S. Ct. 517, 525 (1993) ("*John Hancock*") (noting that ERISA "'obviously and specifically relates to the business of insurance'") (quoting with approval brief of United States as *amicus curiae*); *Morales* v. *Trans World Airlines*, 504 U.S. 374, 383 (1992) ("*Morales*") (holding that the "ordinary meaning" of "relating to" is a "broad one" and citing Black's Law Dictionary definition of "relate").

The Eleventh Circuit's insupportably narrow interpretation of the second part of McCarran-Ferguson cannot coexist with its broad interpretation of the first part. "Relates," the word Congress chose to use in the second part of McCarran-Ferguson, plainly encompasses a larger set of relationships than does "regulating," the word Congress chose for the first part. *Compare Morales*, 504 U.S. at 383, *with Fabe*, __ U.S. at __, 113 S. Ct. at 2210. A statute that "regulat[es]" insurance also "relates" to insurance, but a statute that "relates" to insurance does not necessarily "regulat[e]" it. Thus, if a state statute *barring* national banks from acting as insurance agents is a statute "enacted for the purpose of regulating" insurance, a federal statute that *allows* banks to act as insurance agents must, at a minimum, "specifically relat[e] to" insurance. Once the Eleventh Circuit concluded that certain national bank activities constitute the "business of insurance" and that a statute prohibiting banks from engaging in those activities "regulat[es] the business of insurance," it was bound to conclude that a federal statute permitting banks to participate in those activities at least "relates to the business of insurance."

The Eleventh Circuit attempts to overcome the flaws in its analysis of the statutory language by insisting that, with Section 92, "Congress was concerned with banking, not insurance." *Barnett Bank*, 43 F.3d at 637.

This argument, however, sets up a false dichotomy that fails to address the "specifically relates to" test of McCarran-Ferguson. Even if a statute can only "regulat[e]" one industry or one business (which is questionable), that statute can still "relat[e]" to other industries or businesses. *See John Hancock*, __ U.S. at __, 114 S. Ct. at 525. Obviously, Congress was regulating banking in the National Bank Act, but just as obviously when it enacted Section 92 it regulated banking in a manner that plainly "relates" to insurance.

At the same time, the Eleventh Circuit's false dichotomy proves too much, undermining its own analysis of the first part of McCarran-Ferguson. If a statute permitting banks to sell insurance products (*i.e.*, Section 92) is a banking statute, and not an insurance statute, so too must a statute prohibiting banks from offering such services (*i.e.*, the Florida statute) be a banking statute and not an insurance statute. Applying this logic to the first part of McCarran-Ferguson, Fla. Stat. ch. 626.988(2) must be deemed a banking rather than an insurance statute because it targets the relationship between banks and their customers.

The Eleventh Circuit opinion is thus invalidated by its irreconcilable internal inconsistency. A principled and consistent application of McCarran-Ferguson to Fla. Stat. ch. 626.988(2) and Section 92 requires that the Court conclude that the latter preempts the former. Either Section 92 preempts under traditional preemption analysis because Fla. Stat. ch. 626.988(2) was not "enacted for the purpose of regulating insurance," or Section 92 preempts under McCarran-Ferguson because Fla. Stat. ch. 626.988(2) was "enacted for the purpose of regulating insurance" *and* Section 92 "relates to the business of insurance." The similarity of the two statutes and the structure of McCarran-Ferguson allow no other conclusion.

II.

The Eleventh Circuit's Erroneous Application of the McCarran-Ferguson Act Is Inconsistent With the Established Rule That State Laws Yield to Federal Regulation of National Banks

Congress has the primary authority to define the scope and nature of activities in which national banks may engage. *See Nationsbank*, __ U.S. at __, 115 S. Ct. at 813. Where Congress has affirmatively granted powers to national banks, "any attempt by a state to define their duties or control the conduct of their affairs is void." *First Nat'l Bank* v. *California*, 262 U.S. 366, 369 (1923); *see also Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). States may not vary or limit those powers unless the federal statute expressly invites states to do so. *See Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378 (1954) ("*Franklin Nat'l Bank*"). The presumptive invalidity of state legislation that seeks to limit powers extended to national banks by Congress ensures the uniformity of national banking throughout the United States. *See Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) ("*Easton*").

The Eleventh Circuit's decision abrogates these established principles, but the plain meaning of Section 92 is clear: national banks have the authority to offer insurance products to their customers, subject to only two express restrictions. First, Section 92 prohibits a bank from paying or guaranteeing premiums paid to the insurer. Second, Section 92 prohibits banks from guaranteeing the truth of statements contained in an insured's application for insurance. While states may regulate aspects of the relationship between an insurance company and a policyholder, a prohibition against selling insurance products when such sales are not permitted by state law is conspicuously absent in an otherwise

detailed and explicit federal statute that permits such sales. The strong presumption that Congress does not pass National Bank Act legislation subject to the approval of state legislators counsels against the interpretation of McCarran-Ferguson adopted by the Eleventh Circuit. *See Franklin Nat'l Bank*, 347 U.S. at 378.

The result reached by the Eleventh Circuit frustrates the important National Bank Act policies of achieving uniformity in national bank activities and enabling Congress to decide what national bank powers and restrictions are in the best interests of the banks themselves, bank customers and the American economy. The Court has recognized that the National Bank Act

> "has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states."

Easton, 188 U.S. at 229. The Eleventh Circuit decision would vitiate this policy by effectively authorizing states to choose whether or not they will recognize Section 92. Petitioner has identified fifteen states that already have attempted to prohibit national banks located in their states from exercising the powers granted by this section of the National Bank Act (Petition at 6 & n.1), and more states may follow suit if the Eleventh Circuit decision is allowed to stand. The Eleventh Circuit decision abrogates the goal of uniformity and Congressional supremacy in national banking powers by sanctioning a patchwork regime, under which the scope of national banks' insurance powers varies from state to state.

The Eleventh Circuit's misconstruction of McCarran-Ferguson runs afoul of well-established principles concerning the interpretation of national bank statutes. By contrast,

adhering to the actual language of McCarran-Ferguson and the Court's precedents, as urged in Section I, *supra*, results in an application of Section 92 that furthers federal interests in the supremacy of national bank legislation. A statutory interpretation that reconciles federal statutes is certainly preferable to an interpretation that creates unnecessary conflict. The Eleventh Circuit construction of McCarran-Ferguson should be rejected in favor of the interpretation that is consistent with the long-standing tradition of the supremacy of federal regulation of national banks over conflicting state statutes in the absence of a clearly expressed Congressional intent to the contrary.

Conclusion

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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